

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA GAMBLING CONTROL BOARD**

In the Matter of the
Lawful Gambling License of
American Legion Post 303, Fridley
License Number 00001

**ORDER ON MOTION FOR
PARTIAL SUMMARY DISPOSITION**

The above-entitled matter came before Administrative Law Judge Barbara L. Neilson on the Minnesota Gambling Control Board's motion for Summary Disposition. The Board filed its motion on March 31, 2003. The Licensee filed its response to the motion on April 11, 2003, and the Board filed its reply on April 18, 2003. Oral argument on the motion was heard on April 23, 2003 at the Office of Administrative Hearings and the record closed for purposes of this motion on that date.

E. Joseph Newton, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103-2122, represented the Minnesota Gambling Control Board. Jack E. Pierce, Attorney at Law, Pierce Law Firm, P.A., 4230 Central Avenue N.E., Minneapolis, Minnesota 55421, represented the American Legion Post 303, Fridley ("Respondent").

Based upon the file, record, and proceedings herein, and for the reasons set forth in the accompanying Memoranda, the Administrative Law Judge makes the following:

ORDER

1. The Board's motion for summary disposition on Count I, paragraphs 18, 19, 22 and 24, is GRANTED.
2. The Board's motion for summary disposition on Count I, paragraphs 20, 21, and 23, is DENIED.
3. The Board's motion for summary disposition on Count II is GRANTED.
4. The Board's motion for summary disposition on Count IV is DENIED.
5. The Board's motion for summary disposition on Count VII is GRANTED.
6. The case shall proceed to hearing as previously scheduled (on June 4-5, 2003) on the remaining allegations.

Dated: May 23, 2003.

/s/ Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

Underlying Facts

The Respondent, American Legion Post 303, Fridley, is licensed by the Gambling Control Board to conduct lawful gambling. The Board issues lawful gambling licenses and premises permits and is empowered to revoke or suspend licenses and premises permits, censure licensees, and/or assess civil penalties for violations of relevant laws and rules.¹ At all times relevant to this proceeding, Respondent has held a premises permit and has conducted lawful gambling by operating a paddlewheel game at its Post located at 7365 Central Avenue N.E. in Fridley, Minnesota. A paddlewheel is a mechanical vertical wheel marked off into numbered sections which, when spun, uses a pointer to indicate the winning number.² Players place bets on a paddlewheel table that has corresponding numbers using paddletickets. Paddletickets are obtained with gaming chips purchased from the paddlewheel operator.³ The paddlewheel operator is required to deposit all cash received for the purchase of gaming chips into a drop box.⁴

In January 2002, a special agent of the Alcohol and Gambling Enforcement Division of the Department of Public Safety conducted an investigation of Respondent's paddlewheel activity. The agent prepared a report alleging several violations including failure to abide by paddlewheel rules and failure to adequately supervise the paddlewheel activity. On March 19, 2002, Respondent appeared before the Board's Compliance Review Group (CRG). The CRG is a committee of the Board that is authorized to conduct hearings, negotiate consent orders, and recommend disciplinary action to resolve licensing violations.⁵ The CRG provided Respondent with a memorandum detailing the alleged violations. On October 9, 2002, Respondent's gambling manager, Rodney Iverson, entered into a Consent Order with the Board. Mr. Iverson admitted that he failed to sufficiently supervise the conduct of lawful gambling at Post 303. As a consequence, the Board revoked Mr. Iverson's gambling manager's license for a period of two years.⁶

On December 24, 2002, the Board served and filed a Notice of and Order for Prehearing Conference alleging seven counts of gambling violations against Respondent. In Count I, the Board alleged that Respondent operated a paddlewheel in violation of Minn. R. 7861.0100, subp. 12 by: not maintaining a separate paddlewheel chip and cash bank cashier from the paddlewheel operators in violation of Minn. R. 7861.0100, subp. 12D; allowing paddlewheel operators to have access to the drop box at the end of shift in violation of Minn. R. 7861.0100, subp. 12H; allowing paddlewheel operators to reconcile and count the paddlewheel receipts at the end of paddlewheel occasions in violation of Minn. R. 7861.0100, subp. 12G; not requiring paddlewheel operators to use fill slips during the course of play of the paddlewheel game in violation of Minn. R. 7861.0100, subp. 12G; and allowing patrons to use paddlewheel chips as

¹ Minn. Stat. §§ 349.151, subd. 4, and 349.155, subd. 4 (2000).

² Minn. R. 7861.0010, subp. 43.

³ Minn. R. 7861.0100, subp. 9C.

⁴ Minn. R. 7861.0100, subp. 12H.

⁵ Minn. R. 7865.0010, subp. 2.

⁶ Affidavit of Gary Danger.

currency to purchase drinks, pull tabs, and other items in violation of Minn. R. 7861.0100, subp. 12D. The Board also alleges in this Count that “by Respondent’s egregious failure, two employees were allowed to steal approximately \$15,000⁷ in lawful gambling receipts.”⁸

In Count II, the Board alleged that Respondent failed to deposit approximately \$51,757.00 in paddlewheel receipts in its lawful gambling bank account in violation of Minn. Stat. § 349.14, subd. 2. In Count III, the Board alleged that Respondent’s gambling employees played the paddlewheel game on a credit basis in violation of Minn. R. 7861.0100, subps. 2G and 6A. In Count IV, the Board alleged that Respondent filed false and inaccurate information with the Department of Revenue and the Board in violation of Minn. Stat. § 349.19, subd. 5. In Count V, the Board alleged that Respondent failed to properly maintain monthly accounting records to adequately reflect gross receipts, profit, net receipts, expenses and other information in violation of Minn. Stat. § 349.19, subds. 5 and 9a, and Minn. R. 7861.0120, subp. 3A. In Count VI, the Board alleged that Respondent failed to maintain sufficient internal controls to protect the integrity of the gambling by allowing someone other than the gambling manager to complete many of the gambling manager’s responsibilities in violation of Minn. R. 7861.0120, subp. 1A. And finally, in Count VII, the Board alleged that Respondent failed to supervise the operation of the paddlewheel at its premises in violation of Minn. Stat. § 349.167, subd. 1, and Minn. R. 7861.0030, subp. 9, and 7861.0060, subp. 1(B).

In its response to the Board’s Request for Admissions, Respondent admitted to a number of the violations contained in Count I regarding the operation of its paddlewheel game. Specifically, Respondent admitted that: (1) on a few occasions it did not tear all losing tickets in half in violation of Minn. R. 7861.0100, subp. 11K;⁹ (2) it allowed patrons to redeem their chips other than through the paddlewheel or cash bank cashier in violation of Minn. R. 7861.0100, subp. 12D;¹⁰ (3) in 1998 or 1999, it did not maintain separate paddlewheel chips and cash bank cashiers for the paddlewheel operator in violation of Minn. R. 7861.0100, subp. 12D;¹¹ (4) for a two-week period Respondent allowed paddlewheel operators to have access to the drop box at the end of the shift in violation of Minn. R. 7861.0100, subp. 12H;¹² and (5) it allowed patrons to redeem chips for drinks, pull tabs, and other items in violation of Minn. R. 7861.0100, subp. 12D.¹³ Respondent denied that any of these violations “allowed” its two employees to steal gambling proceeds. Respondent also denied the Board’s allegations contained in Counts III through VII. And, with respect to Count II, Respondent stated that it could neither admit nor deny that it failed to deposit approximately \$51,757.00 of gaming

7 This amount apparently is based upon the criminal complaints filed against the employees involved. However, Count II of the Notice of and Order for Prehearing Conference asserts that \$51,757 in paddlewheel receipts were not deposited.

8 Notice of and Order for Prehearing Conference, count I, ¶ 23.

9 Respondent Admission No. 17.

10 Respondent Admission No. 21.

11 Respondent Admission No. 25.

12 Respondent Admission No. 26.

13 Respondent Admissions Nos. 30-32.

receipts into its gambling bank account because it does not know the exact amount of money stolen by its employees.

The Board has moved for partial summary disposition on Counts I, II, IV and VII based on Respondent's admissions and the terms of the Consent Order entered into by Respondent's gambling manager and the Board. In addition, although Respondent neither admitted nor denied that it failed to deposit in excess of \$51,757.00 worth of gambling receipts in its gambling bank account as alleged in Count II, the Board contends that it is entitled to summary disposition on this allegation as well because Respondent has admitted that some amount of money was stolen by its employees and that this money was not deposited into its gambling account as required.

Scope and Standard of Review

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.¹⁴ The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters.¹⁵

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.¹⁶ To successfully resist a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case.¹⁷ A nonmoving party cannot rely on pleadings alone to defeat a summary judgment motion.¹⁸ The nonmoving party must establish the existence of a genuine issue of material fact by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05.¹⁹

When considering a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party,²⁰ and all doubts and factual inferences

14 Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1995); Louwagie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. Rules, 1400.5500K; Minn.R.Civ.P. 56.03.

15 See Minn. Rules 1400.6600 (2002).

16 Illinois Farmers Insurance Co. v. Tapemark Co., 273 N.W.2d 630, 634 (Minn. 1978); Highland Chateau v. Minnesota Department of Public Welfare, 356 N.W.2d 804, 808 (Minn. App. 1984).

17 Thiele v. Stitch, 425 N.W.2d 580, 583 (Minn. 1988); Hunt v. IBM Mid America Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986).

18 White v. Minnesota Dept. of Natural Resources, 567 N.W.2d 724 (Minn. App. 1997).

19 *Id.*; Murphy v. Country House, Inc., 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1988).

20 Ostendorf v. Kenyon, 347 N.W.2d 834 (Minn. App. 1984).

must be resolved against the moving party.²¹ If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.²²

Allegations and Contentions of the Parties

The Board argues that Respondent has admitted to a number of rule violations regarding its paddlewheel operation and that these violations on their own are sanctionable. Although the Board concedes that each discrete violation listed in Count I is minor, the Board insists that together they demonstrate a failure on the part of Respondent to supervise its paddlewheel operations in violation of Minn. Stat. § 349.167, subd. 1 and Minn. R. 7861.0030, subp. 9, and 7861.0060, subp. 1B.²³ The Board contends that this failure to supervise resulted in the loss and theft of more than \$51,000.00 of charitable gambling money and the filing of numerous false reports to the Department of Revenue and the Board in violation of Minn. Stat. § 349.19, subd. 5 and 349.155, subd. 4(3).²⁴ Finally, the Board maintains that, because Respondent's gambling manager, Rodney Iverson, admitted in the Consent Order that he failed to sufficiently supervise the gambling at Post 303, Respondent itself is ultimately responsible for failing to supervise its gambling operations in violation of Minn. Stat. § 349.167, subd. 1, and Minn. Rules 7861.0030, subp. 9, and Minn. Rules 7861.0060, subp. 1(B).²⁵

In support of its argument that Respondent is responsible for its manager's failure to supervise, the Board cites to *In re the Lawful Gambling License of Henry Youth Hockey Association*.²⁶ In that case, the Minnesota Gambling Control Board revoked the gambling license of a nonprofit association after finding that the Association engaged in a pattern of willful violations of law and rule. Specifically, the Association's gambling managers failed to file and maintain appropriate accounting and tax records, and an audit by the Department of Revenue revealed cash shortages of \$117,376 for one year. The Association argued that it was not responsible for the violations of law and rules committed by its principals and that the principals' illegal actions should not be imputed to the organization. The Court of Appeals held that the willful violations of an artificial entity's officers and employees can be imputed to an entity such as the Association. The Court defined "willful violations" to include "those done with careless disregard for legal requirements." Citing to a case decided by the U.S. Court of Appeals for the First Circuit,²⁷ the Court explained that an association may not abdicate its statutory and rule responsibilities or plead ignorance of legal requirements by delegating all of its legal responsibilities to an employee. Because the Court found that the association's officers and gambling managers engaged in a pattern of willful violations

21 See, e.g., *Celotex*, 477 U.S. at 325; *Thompson v. Campbell*, 845 F.Supp. 665, 672 (D.Minn. 1994); *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971).

22 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986).

23 Count VII of Board's Notice of Hearing.

24 Count IV.

25 Danger Affidavit attachment.

26 511 N.W.2d 452 (Minn. App. 1994).

27 *United States v. Cincotta*, 689 F.2d 238 (1st Cir.), *cert. denied*, 459 U.S. 991, 103 S.Ct. 347, 74 L.Ed.2d 387 (1982).

of law and rule, the Court held that the association itself engaged in a pattern of willful violations of law and rule.²⁸

Respondent argues that the Board has failed to demonstrate any causal connection between the minor violations contained in Count I and the theft of over \$51,000 in gambling receipts committed by its employees. Respondent maintains that the employees who committed the theft did so by, among other things, falsely marking winning tickets as being worth more than they were and pocketing the difference, stealing sheets of tickets, marking some as winners and pocketing the cash, and simply taking money from patrons and never placing it in the drop box. According to Respondent, none of this criminal conduct is connected to the technical rule violations cited by the Board. Because the Board has failed to show that the minor rule violations listed in Count I “allowed” its employees to steal lawful gambling receipts, Respondent argues that summary disposition on Count I should be denied.

Respondent also contends that its employees’ criminal conduct cannot be imputed to the American Legion Post and summary disposition on Count VII’s failure to supervise allegation should be denied. Citing to the First Circuit case relied on by the Court of Appeals in *Henry Youth*,²⁹ Respondent argues that where intent is an element of a crime, an organization may not be held strictly accountable for acts that could not benefit the stockholders. Respondent asserts that *Henry Youth* does not apply in this matter because it dealt only with willful and not criminal violations on the part of an organization’s employees. According to Respondent, the specific intent necessary for felony theft at issue here cannot be imputed to the American Legion Post 303.

Finally, Respondent argues that the Board’s motion for summary disposition on Count IV must be denied because Respondent did not falsely complete forms or knowingly file false information with the Board and Department of Revenue as alleged. Instead, Respondent maintains that the employees who were engaged in the theft created inaccurate reports and records in an attempt to conceal their crime. Respondent asserts that it reasonably relied on the false information and filed the reports with the Board and Department of Revenue without knowing that the information was inaccurate. Respondent contends that, had it known the information contained in the reports was false, it would not have filed them. Respondent argues that it was misled by employees engaged in criminal conduct and that it should not be found to have falsely completed and filed reports with the Board and Department of Revenue as alleged in Count IV.

Analysis

Respondent has admitted to three of the rule violations contained in Count I governing the operation of its paddlewheel game. Specifically, Respondent admits that it did not maintain a separate paddlewheel chip and cash bank cashier from the paddlewheel operators in violation of Minn. Rule 7861.0100, subp. 12D. Respondent also admits that for a brief two-week period it allowed paddlewheel operators to have access to the drop box at the end of shift in violation of Minn. Rule 7861.0100, subp.

²⁸ *Henry Youth*, 511 N.W.2d at 456.

²⁹ 511 N.W.2d 452, 456 (Minn. App. 1994) citing *United States v. Cincotta*, 689 F.2d 238, 242 (1st Cir.), *cert. denied*, 459 U.S. 991, 103 S.Ct. 347, 74 L.Ed. 2d 387 (1982).

12H. And Respondent admits that it allowed patrons to use paddlewheel chips as currency to purchase drinks, pull tabs, and other items in violation of Minn. Rule 7861.0100, subp. 12D. As to these violations, there are no material fact issues present and summary disposition will be granted as a matter of law. Summary disposition is denied, however, with respect to the remaining allegations contained in Count I (i.e., the allegations that Respondent allowed its paddlewheel operators to reconcile and count receipts at the end of paddlewheel occasions, paddlewheel operators were not required to use fill slips, and Respondent's "egregious failure" "allowed" two employees to steal lawful gambling receipts. The Administrative Law Judge finds that genuine issues of material fact preclude granting summary disposition on those allegations.

In Count II, the Board alleges that Respondent failed to deposit gambling receipts into its gambling bank account in violation of Minn. Stat. § 349.14, subd. 2. Respondent admits that gambling proceeds were stolen. But, because Respondent does not know the exact amount stolen, it refused to admit or deny the allegation contained in Count II.³⁰ As an initial matter, the Administrative Law Judge notes that the Board cited to the wrong statutory provision for this count in its Notice of and Order for Prehearing Conference. The correct cite is Minn. Stat. § 349.19, subd. 2. The Respondent has, however, responded to the substance of the allegation and the ALJ finds that the incorrect citation did not deprive Respondent of adequate notice. The Board maintains that Respondent lost approximately \$51,757.00 in gambling receipts and failed to deposit this amount in its gambling bank account. It is not necessary to establish the exact amount of gambling receipts lost in order for the Board to prevail on this claim. The Board need only show that Respondent failed to deposit some amount of gambling receipts into its gambling bank account as required. Because Respondent admits that gambling receipts were stolen and not deposited into its gambling bank account, no genuine issues of material fact remain as to this count. Due to the theft of gambling proceeds committed by its employees, Respondent failed to deposit gambling receipts into its gambling bank account in violation of Minn. Stat. § 349.19, subd. 2. Summary disposition on this count is granted.

In Count IV, the Board alleges that Respondent filed false and inaccurate reports with the Board and the Department of Revenue in violation of Minn. Stat. § 349.19, subd. 5. Specifically, the Board alleges that: (1) Respondent falsely and inaccurately completed its Closed Games Reporting forms and tax returns filed with the Department of Revenue; (2) Respondent used false and inaccurate figures when reporting gross receipts and prizes paid from closed games; and (3) Respondent reported disallowed paid prizes and used unsupported figures to reconcile its gambling account. Respondent denies that it falsely completed reports or filed false information. Instead, Respondent maintains that it submitted reports based on figures provided to it by its employees that it believed were accurate. Respondent contends that it was unaware that its employees had provided inaccurate information in order to conceal their theft. The Board maintains that Respondent, as the license holder, is responsible for ensuring accurate figures in all its reports.

30 Respondent's Response to Request for Admissions No. 33 and Answers to Interrogatories at p.2, Request 33.

The Administrative Law Judge finds that there are genuine issues of material fact that preclude granting summary disposition as to this count. The Board has not submitted the forms, records and returns that it maintains contained the false and inaccurate information. Without these and other supporting documents, the Judge is unable to determine as a matter of law that Respondent filed reports containing false and inaccurate information. In addition, the Judge finds that there is a genuine material fact issue as to whether Respondent can be found to have falsely completed reports if, as Respondent alleges, it was unaware at the time that its employees were providing inaccurate figures in order to conceal their criminal conduct. The Board's motion for summary disposition as to this Count is denied.

In Count VII, the Board alleges that Respondent failed to supervise the operation of its paddlewheel game in a compliant manner in violation of Minn. Stat. § 349.167, subd. 1 and Minn. Rules 7861.0030, subp. 9 and 7861.0060, subp. 1(B). The Board has the authority to discipline an organization's gambling license if it finds that such disciplinary action is in the public interest and that:

the applicant or licensee, or a director, officer, partner, governor, person in a supervisory or management position of the applicant or licensee, [or] an employee eligible to make sales on behalf of the applicant or licensee . . . (1) has violated or failed to comply with any provisions of this chapter or chapter 297E or 299L, or any rule adopted or order issued thereunder³¹

Respondent's licensed gambling manager signed a Consent Order in which he admitted that he violated Minn. Stat. § 349.167, subd. 1 and Minn. Rules 7861.0030, subp. 9 and 7861.0060, subp. 1(B) by failing to sufficiently supervise the conduct of lawful gambling at American Legion Post 303. Based on this admission and the holding in *Henry Youth*, the Administrative Law Judge finds that Respondent is responsible for this failure to supervise. The Administrative Law Judge does not find Respondent's attempt to distinguish the holding in *Henry Youth* from the facts at hand to be persuasive. The relevant issue in this matter is whether Respondent failed to supervise its lawful gambling activity. Whether the gambling proceeds were lost due to criminal conduct or a negligent act is not decisive. The Board is not attempting to hold Respondent criminally liable. It is simply alleging that Respondent failed to supervise the lawful gambling conducted on its premises. Here, Respondent's gambling manager admitted to failing to supervise the lawful gambling at Post 303. Based on the holding of *Henry Youth* and Minn. Stat. § 349.155, subd. 4(1), Respondent, as the licensed organization, is responsible for its employee's failure to supervise the gambling activities on its premises. The Administrative Law Judge finds that there are no genuine material fact issues as to this Count. By virtue of Respondent's gambling manager's admissions and Respondent's own admission concerning the paddlewheel operation rule violations contained in Count I, Respondent violated Minn. Stat. § 349.167, subd. 1, and Minn. Rules 7861.0030, subp. 9 and 7861.0060, subp. 1(B) by failing to sufficiently supervise the conduct of lawful gambling at its premises. The Board's motion for summary disposition on Count VII is granted.

³¹ Minn. Stat. § 349.155, subd. 4(1).

B.L.N.